UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DANNETTE K. BROWNE,

Plaintiff,

v.

CAROLYN W. COLVIN, Commissioner of Social Security, [1]

Defendant.

Case No. 3:12-cv-05379-BHS-KLS

REPORT AND RECOMMENDATION

Noted for August 23, 2013

Plaintiff has brought this matter for judicial review of defendant's denial of her applications for disability insurance and supplemental security income ("SSI") benefits. This matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule MJR 4(a)(4) and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). After reviewing the parties' briefs and the remaining record, the undersigned submits the following Report and Recommendation for the Court's review, recommending that for the reasons set forth below, defendant's decision to deny benefits be reversed and this matter be remanded for further administrative proceedings.

FACTUAL AND PROCEDURAL HISTORY

On March 11, 2008, plaintiff filed an application for disability insurance benefits and another one for SSI benefits, alleging in both applications that she became disabled beginning

[1] On February 14, 2013, Carolyn W. Colvin became the Acting Commissioner of the Social Security Administration. Therefore, under Federal Rule of Civil Procedure 25(d)(1), Carolyn W. Colvin is substituted for Commissioner Michael J. Astrue as the Defendant in this suit. **The Clerk of Court is directed to update the docket accordingly.**

August 1, 2003 (see Administrative Record ("AR") 24), due to the following impairments:

> **Degenerative joint disease/kephoscoliosis, Left rotator cuff tear/rt shoulder bursitis, Fibromyalgia and paraseziures, Arthritis/cervical arthritis/muscles spasms, Syrinx/numbness and tingling in arms/hands, Irritable bowel syndrome/chronic diarrhea, Dysphagia/intestinal spasms/mild ulcer, Depression and anxiety, Bi-lateral knee pain, Foraminal narrowing/nerve root compression[.]**

AR 156 (emphasis in original). Both applications were denied upon initial administrative review on July 24, 2008, and on reconsideration on December 8, 2008. See AR 24. A hearing was held before an administrative law judge ("ALJ") on February 3, 2010, at which plaintiff, represented by counsel, appeared and testified, as did a vocational expert. See AR 40-67.

In a decision dated March 18, 2010, the ALJ determined plaintiff to be not disabled. See AR 24-35. Plaintiff's request for review of the ALJ's decision was denied by the Appeals Council on February 22, 2012, making the ALJ's decision the final decision of the Commissioner of Social Security (the "Commissioner"). See AR 1; see also 20 C.F.R. § 404.981, § 416.1481. On May 4, 2012, plaintiff filed a complaint in this Court seeking judicial review of the Commissioner's final decision. See ECF #4. The administrative record was filed with the Court on October 9, 2012. See ECF #11. The parties have completed their briefing, and thus this matter is now ripe for the Court's review.

Plaintiff argues the Commissioner's final decision should be reversed and remanded for an award of benefits, or in the alternative for further administrative proceedings, because the ALJ erred:

(1) in rejecting the August 21, 2007 opinion provided by David Hays, M.D.;

(2) by failing to find plaintiff's muscle spasms, arm and hand paresthesias and irritable bowel syndrome are "severe" impairments;

(3) in evaluating the medical evidence from John W. Luckwitz, M.D., Kirk L. Wong, M.D., Matthew J. Gambee, M.D., Jaimie Nicacio, M.D., and

Theresa Karplus, M.D.;

(4) in discounting plaintiff's credibility;

(5) in assessing plaintiff's residual functional capacity; and

(6) in finding plaintiff to be capable of performing other jobs existing in significant numbers in the national economy.

For the reasons set forth below, the undersigned finds the ALJ erred in regard to issue (1) above, and thus also in regard to issues (2), (5) and (6). Also for the reasons set forth below, however, the undersigned recommends that while defendant's decision to deny benefits should be reversed because of these errors, this matter should be remanded for further administrative proceedings in accordance with the findings contained herein.

DISCUSSION

The determination of the Commissioner of Social Security (the "Commissioner") that a claimant is not disabled must be upheld by the Court, if the "proper legal standards" have been applied by the Commissioner, and the "substantial evidence in the record as a whole supports" that determination. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); see also Batson v. Commissioner of Social Security Admin., 359 F.3d 1190, 1193 (9th Cir. 2004); Carr v. Sullivan, 772 F.Supp. 522, 525 (E.D. Wash. 1991) ("A decision supported by substantial evidence will, nevertheless, be set aside if the proper legal standards were not applied in weighing the evidence and making the decision.") (citing Brawner v. Secretary of Health and Human Services, 839 F.2d 432, 433 (9th Cir. 1987)).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation omitted); see also Batson, 359 F.3d at 1193 ("[T]he Commissioner's findings are upheld if supported by inferences reasonably drawn from the record."). "The substantial evidence test

requires that the reviewing court determine" whether the Commissioner's decision is "supported by more than a scintilla of evidence, although less than a preponderance of the evidence is required." Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). "If the evidence admits of more than one rational interpretation," the Commissioner's decision must be upheld. Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984) ("Where there is conflicting evidence sufficient to support either outcome, we must affirm the decision actually made.") (quoting Rhinehart v. Finch, 438 F.2d 920, 921 (9th Cir. 1971)). [2]

I. The ALJ's Rejection of the Opinion of Dr. Hays

The ALJ is responsible for determining credibility and resolving ambiguities and conflicts in the medical evidence. See Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998). Where the medical evidence in the record is not conclusive, "questions of credibility and resolution of conflicts" are solely the functions of the ALJ. Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982). In such cases, "the ALJ's conclusion must be upheld." Morgan v. Commissioner of the Social Sec. Admin., 169 F.3d 595, 601 (9th Cir. 1999). Determining whether inconsistencies in the medical evidence "are material (or are in fact inconsistencies at all) and whether certain factors are relevant to discount" the opinions of medical experts "falls within this responsibility." Id. at 603.

In resolving questions of credibility and conflicts in the evidence, an ALJ's findings

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[2] As the Ninth Circuit has further explained:

> . . . It is immaterial that the evidence in a case would permit a different conclusion than that which the [Commissioner] reached. If the [Commissioner]'s findings are supported by substantial evidence, the courts are required to accept them. It is the function of the [Commissioner], and not the court's to resolve conflicts in the evidence. While the court may not try the case de novo, neither may it abdicate its traditional function of review. It must scrutinize the record as a whole to determine whether the [Commissioner]'s conclusions are rational. If they are . . . they must be upheld.

Sorenson, 514 F.2dat 1119 n.10.

"must be supported by specific, cogent reasons." Reddick, 157 F.3d at 725. The ALJ can do this "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." Id. The ALJ also may draw inferences "logically flowing from the evidence." Sample, 694 F.2d at 642. Further, the Court itself may draw "specific and legitimate inferences from the ALJ's opinion." Magallanes v. Bowen, 881 F.2d 747, 755, (9th Cir. 1989).

The ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of either a treating or examining physician. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996). Even when a treating or examining physician's opinion is contradicted, that opinion "can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record." Id. at 830-31. However, the ALJ "need not discuss *all* evidence presented" to him or her. Vincent on Behalf of Vincent v. Heckler, 739 F.3d 1393, 1394-95 (9th Cir. 1984) (citation omitted) (emphasis in original). The ALJ must only explain why "significant probative evidence has been rejected." Id.; see also Cotter v. Harris, 642 F.2d 700, 706-07 (3rd Cir. 1981); Garfield v. Schweiker, 732 F.2d 605, 610 (7th Cir. 1984).

In general, more weight is given to a treating physician's opinion than to the opinions of those who do not treat the claimant. See Lester, 81 F.3d at 830. On the other hand, an ALJ need not accept the opinion of a treating physician, "if that opinion is brief, conclusory, and inadequately supported by clinical findings" or "by the record as a whole." Batson v. Commissioner of Social Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004); see also Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001). An examining physician's opinion is "entitled to greater weight than the opinion of a nonexamining physician." Lester, 81 F.3d at 830-31. A non-examining physician's opinion may

constitute substantial evidence if "it is consistent with other independent evidence in the record." Id. at 830-31; Tonapetyan, 242 F.3d at 1149.

The record contains a letter from Dr. Hays in which he stated plaintiff had the following impairments: chronic upper back pains and muscle spasms, a left rotator cuff tear; chronic abdominal pains and diarrhea, bilateral knee pains, and "some chronic paresthesias" of her upper extremities. AR 409-10. Dr. Hays went on to opine in relevant part:

> I do thing [sic] that the above [impairments and conditions] does not prevent [plaintiff] from looking for employment but do think that she will be restricted in the duration of her work, probably to 3-4 hours at a time, and that she will have some days on which her pain is so great that she will no [sic] be able to participate.
>
> I am not clear on the duration of her incapacity. Again she has had several years of a steadily worsening course despite close followup and several different treatments.
>
> She should not be doing any heavy lifting with her work.

AR 412. With respect to these opinions, the ALJ stated she was giving them "some weight, but little weight overall" because:

> . . . First, it is notable that his restrictions are more limiting than [the] claimant's own self-reports. For example, in August 2007 [the] claimant reported that on her good days she would be able to work without much problem, while Dr. Hays limits [the] claimant to three or four hours of work on her good days. Se [sic] Ex. 6F/19. Dr. Hays' opinions are not internally consistent and moreover and [sic] not adequately supported by clinical findings or the record as a whole.

AR 32-33.

As to the ALJ's first stated reason for rejecting Dr. Hays' opinions, plaintiff argues the inconsistency between her self-report that she would be able to work without much problem on her good days and Dr. Hays' statement that she could only work for three or four hours on such days is not meaningful. Specifically, plaintiff asserts that she did not actually tell Dr. Hays she

could work *full-time* on her good days, and that the real issue is not how much work she can do on her good days, but how little work she can do on her bad days, which is fully consistent with Dr. Hays' opinion on that issue.

In regard to plaintiff's first point, her statement to Dr. Hays that "[o]n a good day . . . she would be able to work without much problem" is most reasonably read to mean she would have no real issues with performing a full work day on those days, given that the phrase "without much problem" clearly indicates she felt she would not have any actual restrictions from being able to do so. AR 427. As such, the ALJ was not remiss in discounting Dr. Hays' opinion limiting plaintiff to only three to four hours of work on her good days. See Morgan, 169 F.3d at 601-02 (upholding rejection of physician's conclusion that claimant suffered from marked limitations in part on basis that other evidence of claimant's ability to function, including reported activities of daily living, contradicted that conclusion); Magallanes, 881 F.2d at 754 (finding ALJ properly rejected one physician's opinion in part on basis that it conflicted with claimant's subjective pain complaints).

Plaintiff is also correct, though, that her report to Dr. Hays that on bad days she felt like she could "barely get out of bed" (AR 427) is not inconsistent with his opinion that she would not be able to participate in work on those days (see AR 412). The ALJ thus erred in rejecting it because it was more limiting than alleged by plaintiff. In addition, the undersigned agrees with plaintiff that the ALJ's statement that "Dr. Hays' opinions are not internally consistent . . . and not adequately supported by clinical findings or the record as a wholly," provides an insufficient basis upon which to reject those opinions. See Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988).[3] It is true that, as defendant points out and as noted above, an ALJ need not accept the

[3] As the Ninth Circuit in Embrey explained:

opinion of a treating physician, if it is "brief, conclusory, and inadequately supported by clinical findings" or "by the record as a whole." Batson, 359 F.3d at 1195; see also Thomas, 278 F.3d at 957; Tonapetyan, 242 F.3d at 1149.

The ALJ, though, offers no explanation as to how the opinions of Dr. Hays are internally inconsistent. Nor does the ALJ provide any description of those clinical findings or other evidence in the record she found to be inconsistent therewith. As defendant notes, the ALJ did set forth a detailed discussion of the medical and other evidence in the record. See AR 30-33. But notably the ALJ did not actually discuss the treatment notes from Dr. Hays. In addition, although it may be that much of the evidence in the record, including such treatment notes, does not support the functional limitations found by Dr. Hays, the ALJ does not clearly – or indeed at all – link that evidence to her evaluation of those limitations. Without any such discussion, the Court is unable to determine whether the ALJ properly considered that evidence in rejecting those opinions, and thus that rejection cannot be upheld at this time.

II. The ALJ's Step Two Determination

Defendant employs a five-step "sequential evaluation process" to determine whether a claimant is disabled. See 20 C.F.R. § 404.1520; 20 C.F.R. § 416.920. If the claimant is found disabled or not disabled at any particular step thereof, the disability determination is made at that step, and the sequential evaluation process ends. See id. At step two of the evaluation process, the ALJ must determine if an impairment is "severe." 20 C.F.R. § 404.1520, § 416.920. An impairment is "not severe" if it does not "significantly limit" a claimant's mental or physical

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> To say that medical opinions are not supported by sufficient objective findings or are contrary to the preponderant conclusions mandated by the objective findings does not achieve the level of specificity our prior cases have required, even when the objective factors are listed seriatim. The ALJ must do more than offer his conclusions. He must set forth his own interpretations and explain why they, rather than the doctors', are correct. . . .

Id. (internal citations omitted).

abilities to do basic work activities. 20 C.F.R. § 404.1520(a)(4)(iii), (c), § 416.920(a)(4)(iii), (c); see also Social Security Ruling ("SSR") 96-3p, 1996 WL 374181 *1. Basic work activities are those "abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 404.1521(b), § 416.921(b); SSR 85- 28, 1985 WL 56856 *3.

An impairment is not severe only if the evidence establishes a slight abnormality that has "no more than a minimal effect on an individual[']s ability to work." SSR 85-28, 1985 WL 56856 *3; see also Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996); Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir.1988). Plaintiff has the burden of proving that her "impairments or their symptoms affect her ability to perform basic work activities." Edlund v. Massanari, 253 F.3d 1152, 1159-60 (9th Cir. 2001); Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1998). The step two inquiry described above, however, is a *de minimis* screening device used to dispose of groundless claims. See Smolen, 80 F.3d at 1290.

At step two in this case, the ALJ found plaintiff had "severe" impairments consisting of a left rotator cuff syndrome, fibromyalgia, back pain, knee pain, a major depressive disorder, and a panic disorder. See AR 26. The ALJ did not find to be "severe" plaintiff's muscle spasms or arm and hand numbness and tingling, stating that they "caused only transient and mild symptoms and limitations, are well controlled with treatment or are otherwise not adequately supported by the medical evidence in the record." AR 27. With respect to plaintiff's irritable bowel syndrome the ALJ found it to be non-severe as well, noting that it was "well-controlled with medication," that plaintiff had "testified that she has had this problem since the age of eighteen," while "the record shows she was able to work in spite of this impairment in the past," and that despite alleging she had "diarrhea five to eight times day, her weight has remained stable." Id.

Plaintiff argues "[t]he medical evidence of record does indeed establish that" these three additional impairments are severe (ECF #15, p. 4), but does not explain what such evidence does so other than merely cite portions of the record where findings of muscle spasms and decreased sensation were noted and to her own testimony (see id. and n. 3 and 4). The mere existence of an impairment or of symptoms related thereto, however, does not by itself establish the presence of significant work-related limitations, let alone disabling ones. See Matthews v. Shalala, 10 F.3d 678, 680 (9th Cir. 1993). In addition, in regard to plaintiff's testimony, at step two of the sequential disability evaluation process, although the ALJ must take into account a claimant's pain and other symptoms (see 20 C.F.R. § 404.1529, § 416.929), the severity determination is made solely on the basis of the objective medical evidence in the record (see SSR 85-28, 1985 WL 56856 *4 ("At the second step . . . medical evidence alone is evaluated in order to assess the effects of the impairment(s) on ability to do basic work activities.").

Plaintiff also does not explain how the ALJ erred in failing to consider any functional effects of those alleged impairments during the later steps of the sequential disability evaluation process. See ECF #15, p. 4; Carmickle v. Commissioner of Social Sec. Admin., 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (issue not argued with specificity in briefing will not be addressed); Paladin Associates., Inc. v. Montana Power Co., 328 F.3d 1145, 1164 (9th Cir. 2003) (by failing to make argument in opening brief, objection to district court's order was waived); Kim v. Kang, 154 F.3d 996, 1000 (9th Cir.1998) (matters not specifically and distinctly argued in opening brief ordinarily will not be considered). That being said, because as discussed above, the ALJ erred in rejecting the opinions of Dr. Hays – and because Dr. Hays relied at least in part on the above alleged impairments in forming his opinions – on remand the Commissioner should consider any impact such impairments may have on plaintiff's ability to function.

III. The ALJ's Assessment of Plaintiff's Residual Functional Capacity

If a disability determination "cannot be made on the basis of medical factors alone at step three of the evaluation process," the ALJ must identify the claimant's "functional limitations and restrictions" and assess his or her "remaining capacities for work-related activities." SSR 96-8p, 1996 WL 374184 *2. A claimant's residual functional capacity ("RFC") assessment is used at step four to determine whether he or she can do his or her past relevant work, and at step five to determine whether he or she can do other work. See id. It thus is what the claimant "can still do despite his or her limitations." Id.

A claimant's residual functional capacity is the maximum amount of work the claimant is able to perform based on all of the relevant evidence in the record. See id. However, an inability to work must result from the claimant's "physical or mental impairment(s)." Id. Thus, the ALJ must consider only those limitations and restrictions "attributable to medically determinable impairments." Id. In assessing a claimant's RFC, the ALJ also is required to discuss why the claimant's "symptom-related functional limitations and restrictions can or cannot reasonably be accepted as consistent with the medical or other evidence." Id. at *7.

The ALJ in this case found plaintiff had the residual functional capacity:

> **. . . to perform sedentary work . . . specifically she: is limited to frequent climbing of stairs and ramps; is limited to frequent balancing and crawling; is limited to occasional climbing of ladders, ropes or scaffolds; is limited to occasional stooping, kneeing, crouching, and overhead reaching with the left upper extremity; would need to avoid concentrated exposure to hazards such as heavy machinery, heights or vibration; could perform one to three step tasks at a moderate pace; could have occasional public contact; is limited to tasks which are routine and predictable.**

AR 28-29 (emphasis in original). Because as discussed above the ALJ failed to properly reject the opinions of Dr. Hays, the Court agrees with plaintiff that the above RFC assessment cannot be said to be supported by substantial evidence. Accordingly, here too the ALJ erred.

IV. The ALJ's Findings at Step Five

If a claimant cannot perform his or her past relevant work, at step five of the disability evaluation process the ALJ must show there are a significant number of jobs in the national economy the claimant is able to do. See Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999); 20 C.F.R. § 404.1520(d), (e), § 416.920(d), (e). The ALJ can do this through the testimony of a vocational expert or by reference to defendant's Medical-Vocational Guidelines (the "Grids"). Tackett, 180 F.3d at 1100-1101; Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2000).

An ALJ's findings will be upheld if the weight of the medical evidence supports the hypothetical posed by the ALJ. See Martinez v. Heckler, 807 F.2d 771, 774 (9th Cir. 1987); Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984). The vocational expert's testimony therefore must be reliable in light of the medical evidence to qualify as substantial evidence. See Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Accordingly, the ALJ's description of the claimant's disability "must be accurate, detailed, and supported by the medical record." Id. (citations omitted). The ALJ, however, may omit from that description those limitations he or she finds do not exist. See Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

At the hearing, the ALJ posed a hypothetical question to the vocational expert containing substantially the same limitations as were included in the ALJ's assessment of plaintiff's residual functional capacity. See AR 62. In response to that question, the vocational expert testified that an individual with those limitations would be able to perform other jobs. See AR 62-63. Based on the testimony of the vocational expert, the ALJ found plaintiff would be capable of performing other jobs existing in significant numbers in the national economy. See AR 34-35. Plaintiff argues, and again the undersigned agrees, that in light of the erroneous rejection of Dr.

Hays' opinions and RFC assessment discussed above, the ALJ erred as well in relying on the vocational expert's testimony to find her to be capable of performing other jobs existing in significant numbers at step five. Given the conflicting evidence in the record also discussed above, however, the undersigned rejects the assertion that the ALJ was required to find plaintiff to be disabled at this step at this time.

V. This Matter Should Be Remanded for Further Administrative Proceedings

The Court may remand this case "either for additional evidence and findings or to award benefits." Smolen, 80 F.3d at 1292. Generally, when the Court reverses an ALJ's decision, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). Thus, it is "the unusual case in which it is clear from the record that the claimant is unable to perform gainful employment in the national economy," that "remand for an immediate award of benefits is appropriate." Id.

Benefits may be awarded where "the record has been fully developed" and "further administrative proceedings would serve no useful purpose." Smolen, 80 F.3d at 1292; Holohan v. Massanari, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded where:

> (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the claimant's] evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

Smolen, 80 F.3d 1273 at 1292; McCartey v. Massanari, 298 F.3d 1072, 1076-77 (9th Cir. 2002). Because as discussed above issues still remain in regard to the medical opinion evidence from Dr. Hays, remand for further consideration of that evidence by the Commissioner is appropriate.

CONCLUSION

For all of the above reasons, the undersigned recommends the Court find the ALJ improperly concluded plaintiff was not disabled. Accordingly, the undersigned recommends as well that the Court reverse defendant's decision to deny benefits and remand this matter to the Commissioner for further administrative proceedings in accordance with the findings contained herein.

Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 72(b), the parties shall have **fourteen (14) days** from service of this Report and Recommendation to file written objections thereto. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. See Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed set this matter for consideration on **August 23, 2013**, as noted in the caption.

DATED this 2nd day of August, 2013.

Karen L. Strombom
United States Magistrate Judge